NO. 21906

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TED DAVID HOWZE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

On November 10, 1966, the Federal Grand Jury for the Southern District of California returned an indictment against the appellant charging him with refusal to be inducted into the Armed Forces of the United States in violation of Title 50, U. S. C., App., Section 462 [C. T. 1]. 1/

Pursuant to a plea of not guilty, trial by court commenced on April 11, 1967, before the Honorable MYRON D. CROCKER,

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1/ "C. T." refers to Clerk's Transcript.

United States District Judge, and on the same date appellant was adjudged guilty [C. T. 21].

The indictment charged:

Defendant TED DAVID HOWZE, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 77, said Board being then and there duly created and acting, under the Selective Service System established by said Act, in Kern County, California, in the Northern Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said Board was duly given to him to report for induction into the armed forces of the United States of America on March 24, 1966, in Kern County, California, in the division and district aforesaid; and at said time and place the defendant knowingly failed and neglected to perform a duty required of him under said Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

On May 1, 1967, United States District Judge Myron D. Crocker committed appellant to the custody of the Attorney General for a term of three years [C. T. 27].

Notice of Appeal was filed on May 1, 1967 [C. T. 26].

Jurisdiction of the District Court was based upon Title 28, United States Code, Section 3231. Jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 50 App., Section 462, United States Code, provides in part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the Armed Forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . ."

Title 32, Code of Federal Regulations, Section 1622.30, provides in part:

"1622.30 Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents.

* * * * *

"(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, ..."

* * * * *

"(d) In the consideration of a dependency claim, any payments of allowances which are payable by the United States to the dependents of persons serving in the Armed Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the grounds for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents."

Title 32 C.F.R. 1625 3, provides in part:

"1625.3 When registrant's classification shall be reopened and considered anew.

"(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) which may have been issued to the registrant."

* * * * *

Title 32 C.F.R. 1625.4, provides in part:

"1625.4 Refusal to reopen and consider anew registrant's classification.

"When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the

registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required."

Title 32 C. F. R. 1641. 2(b) provides:

> "If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

III

QUESTIONS PRESENTED

(1) Having failed to exhaust his administrative remedies and to raise the issue in the trial court, is the appellant entitled to litigate his classification for the first time in this Court?

(2) Did the trial court err in failing to find that appellant was denied due process of law by the manner in which the

local board classified him?

(3) Was the decision of trial court based upon an incorrect ground?

IV

STATEMENT OF FACTS

Appellant's selective service file, Government's Exhibit 1, reveals the following facts:

On October 24, 1960, appellant registered at Local Board No. 77, 225 Chester Street, Bakersfield, California [G.E.-1, pp. 1-2]. 2/

On October 1, 1963, the Local Board mailed appellant a Classification Questionnaire which he completed and returned on October 13, 1963. Appellant indicated in this questionnaire that he was then employed as an Haro operator, and that his prior work experience included that of a cowboy, welder, and farm hand. Series VII of the questionnaire was not completed by the appellant, but appellant signed Series VIII, thereby requesting the Local Board to furnish him a form for conscientious objectors [G.E.-1, pp. 4-9].

On October 30, 1963, the Board received from appellant a Selective Service Form No. 150, which had been mailed to him on October 14, 1963 [G.E.-1, pp. 12-13]. Appellant neglected to

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2/ G.E.-1 refers to Government's Exhibit 1, appellant's Selective Service file.

sign the Claim for Exemption, Series I, on page (1) of the form.

On page (1) of this form, appellant stated, "I believe in one supreme God of the universe and because of my belief in him I cannot place any man or group of men above or any duty to them above the almighty God." [G.E.-1, p. 12]. On page (2), appellant stated that he would use force "only in the event my life has been attempted, and then I would try to only injure and not kill." On page (3), appellant stated that "Jehovah's Witness do not believe in participation of arm forces of any country." Appellant did not answer the question "when, where, and how did you become member of said sect or organization?", on page 3 of the form (pp. 12-15).

On November 11, 1963, appellant was classified 3-A by the Local Board and was mailed notice of this classification on November 7, 1963 [G.E.-1, p. 11].

On February 8, 1965, a Current Information Questionnaire, Form No. 127, was mailed to appellant which was completed and returned by appellant on February 19, 1965 [G.E.-1, p. 11].

On March 5, 1965, appellant was re-classified I-A by the Local Board and was mailed notice of this classification [G.E.-1, p. 11].

On February 4, 1966, appellant's Dependency Questionnaire was reviewed, at which time the Local Board determined that appellant's case should not be reopened and that he should not be reclassified. Notice of this determination was mailed to appellant on February 9, 1966 [G.E.-1, pp. 11, 43].

On February 21, 1966, the Local Board ordered appellant to report for induction on March 24, 1966 [G.E.-1, p. 44]. On March 24, 1966, appellant refused to be inducted into the Armed Services [G.E.-1, pp. 45-46], and gave a signed statement of his refusal [G.E.-1, p. 47].

Appellant's conscientious objector's form (SSS 150) was reviewed and considered by the local board prior to classifying appellant [R.T. 13]. 3/

V

ARGUMENT

A. APPELLANT MAY NOT FOR THE FIRST TIME IN THIS COURT RAISE THE ISSUE OF WHETHER THERE IS A BASIS-IN-FACT FOR HIS CLASSIFICATION.

At no stage of the proceedings, from the date of appellant's original classification until the filing of his opening brief in this Court, has appellant alleged that the draft board's classification was without basis-in-fact.

This Court will not consider an issue on appeal which was never raised at the trial below.

Morales v. United States, 373 F.2d 527 (9th Cir. 1967);

3/ "R.T." refers to Reporter's Transcript.

Grant v. United States, 291 F. 2d 746
(9th Cir. 1961), cert. denied
368 U.S. 399 (1961).

Appellant is not entitled to judicial review by a trial court, much less this Court, of his classification, since he neither requested a personal appearance before the board, nor appealed his classification [R. T. 17-18].

Woo v. United States, 350 F. 2d 994
(9th Cir. 1965);

Grief v. United States, 348 F. 2d 914
(9th Cir. 1965);

Williams v. United States, 203 F. 2d 85
(9th Cir. 1953), cert. denied
345 U.S. 1003 (1953);

Defendant is deemed to have waived his rights and privileges when he has failed to exhaust his administrative remedies by a timely appeal from the Board's classification.

32 C.F.R. 1641.2(b).

A registrant who believes he has been erroneously classified must exhaust all administrative remedies before his claim may be heard in the courts.

Woo v. United States, supra;

Williams v. United States, supra.

Dickinson [4] and Franks [5] cited by appellant [AB 5] [6] are inapposite since appellants there exhausted their administrative remedies and raised the issue at trial.

B. NO DUE PROCESS RIGHTS OF APPELLANT WERE VIOLATED BY THE LOCAL BOARD'S REFUSAL TO REOPEN APPELLANT'S FILE AFTER REVIEWING HIS DEPENDENCY CLAIM.

Again, appellant submits an issue for review by this Court which was not broached at trial. As pointed out earlier, this Court will not consider the issue under these circumstances.

Morales v. United States, supra;

Grant v. United States, supra.

The local board reviewed appellant's request and denied his motion to reopen his classification [G.E.-1, p. 11; R.T. 9]. The Board need not reopen a registrant's file each time such a communication is received, thereby affording him another opportunity to appeal.

Woo v. United States, supra.

Miller v. United States, [7] relied upon by appellant, does

4/ Dickinson v. United States, 346 U.S. 389 (1953).

5/ Franks v. United States, 216 F.2d 266 (9th Cir. 1954).

6/ "AB" refers to Appellant's Brief.

7/ No. 21,417, United States Court of Appeals for the Ninth Circuit, Dec. 29, 1967.

not require reopening each time a registrant submits a new claim for a deferment.

As distinguished from Miller, the record before this Court discloses no basis upon which to conclude that the Local Board "shortcut the situation by directly proceeding . . . to a consideration of whether appellant was entitled to a . . . classification on the merits of the probative elements of its file." Miller v. United States, supra, p. 5.

Further, no evidence was submitted below and none is revealed by the record which would enable this Court to conclude that the Local Board did not "deal with the alleged facts or evidence of appellant's [dependency] form as a question of whether this legally could provide a basis for a reopening to be made. . . ." Miller v. United States, supra, p. 5.

On the contrary, the record indicates that the Board treated appellant's claim as a motion to reopen which was properly denied; that is to say, the Local Board here did not engage in a general consideration and evaluation of the facts in appellant's entire file, as was the case in Miller.

However, had the issue been raised at trial, the trial court could have found that the Local Board based its refusal to reopen and reclassify the appellant solely on the facts revealed in the dependency claim itself, in that appellant's claim merely asserts a possible financial hardship to his parents which would be relieved by military payments and allowances and by contributions from the registrant's brothers and sisters [G. E. -1, pp. 38-40]. See

32 C.F.R. 1622.30(d), 1625.4.

In this connection, it is submitted that the requirements enunciated in Miller have no application to claims for exemption or deferment other than conscientious objector's claims because of the nature of the claim for a conscientious objection and the manner of establishing it. A prima facie showing of a conscientious objection is made by merely asserting one's commitment to certain principles. The registrant's sincerity is the paramount concern of the Board. The extreme financial hardship exemption, however, requires that objective facts be set forth to establish a prima facie case and the registrant's sincerity is not the determining factor. In the latter case, the local board can evaluate the merits of a registrant's request without going beyond the facts submitted in the claim itself; whereas, when a conscientious objector exemption is sought, the prima facie showing required is such that the board frequently must resort to a review of the entire file in order to evaluate the sincerity of the registrant. For this reason, Miller should not be extended to require reopening where the Local Board, as here, considers a claim for exemption or deferment other than a conscientious objection and refuses to reopen or reclassify the registrant.

Another reason requires that Miller be strictly limited to its facts. If reopening is required irrespective of the manner in which the Board considers and rejects the registrant's claim, the type of exemption or deferment claimed, and the factual showing made by the registrant, the selective service system would be

rendered ineffectual. A registrant simply by repeatedly submitting claims for deferment or exemption, followed by the taking of administrative appeals from denials of those claims, could delay induction indefinitely. In short, conscription could be avoided by anyone who chooses to do so.

C. THE COURT'S DECISION WAS NOT ERRONEOUS.

In rendering its decision the court said:

> "I think the Board did consider your conscientious objection and denied it and then you should have appealed from it to call that to their attention to regain consideration, although I don't think it would have done any good. So, I will find you guilty of the offense as charged." [R. T. 33].

The court rejected appellant's contention that the board failed to consider his conscientious objector claim before classifying him 1-A, and there was substantial evidence to support the finding [R. T. 9-10 and 32].

The issue in Franks v. United States, supra, adverted to by appellant [AB 10], was never raised in the court below. Nothing at trial or in appellant's selective service file indicates that the board classified defendant 1-A because they knew he would not accept a 1-A-O or any other classification. Neither does a reading

of the trial court's entire comments indicate that the court decided the case on a ground not before it.

VI

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen
CRAIG B. JORGENSEN